IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3670 OF 2006

Mahavir Mharma Chougule & Ors. .. Petitioners
Versus
Charudatta Kallappa Chougule .. Respondent.

Mr.S.V.Sadavarte for petitioners
Mr.R.S.Wagh i/b. Tejas Ingale for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 16th June 2007.

P.C.

. This petition under Article 227 of the Constitution of India is by original defendants in R.C.S.No.76 of 2004 which is filed by the respondent for perpetual injunction restraining the petitioner from in any manner obstructing him from making any construction on C.T.S.No.32 which

according to him has been allotted/purchased as part of his share. Petitioners contend that they are owners of C.T.S.No.33, 34, 37 and 38 which are situated on southern and western side of the suit property.

2. In the application for temporary injunction preferred by the respondent - plaintiff before the trial court, an injunction was granted restraining defendants (petitioners before me) from obstructing plaintiff from carrying on construction over C.T.S.No.32. However, at the same time, the respondent was directed not to demolish, according to trial court, the common stone pillar of the Gate and the water channel while making construction.

3. Respondent challenged the second direction of the trial court putting restraint upon him by filing an appeal which was allowed by the lower appellate court on 8th March 2006 and

the direction came to be set aside.

4. Aggrieved by this order of the lower appellate court, petitioners original defendants have approached this Court.

5. Mr.Sadavarte learned Advocate appearing for petitioner contends that it is no doubt true that the plaintiff has purchased 1/5th share but the pillar is common so also the water channel. If while making construction the respondent - plaintiff in any manner breaks or demolishes the pillar, there is every likelihood that petitioners would be prejudiced in their enjoyment of the property, which has come to their share. Further, they would not be able to enjoy the same, if the course of water is obstructed by removing water channel. In substance, the contention is that both pillar and the water channel is common to all properties which are adjoining each other.

6. After perusing the order of the lower appellate court, it is apparent that the lower appellate court was pursuaded to take this view on the strength of the P.R.Card of C.T.S.No.31 and 32, copy of City Survey map and the Court Commissioner's report. The lower appellate court, therefore, observed that as far as existence of the common pillar is concerned, petitioner - original defendants have not produced any evidence to show that the pillar is common. In these circumstances and they having not filed any application under Order XXXIX Rule 1 in respect of pillar or a counter claim, that, it is not open to them to seek any direction against plaintiff in the his application for temporary injunction.

7. Once such is the view taken by the lower appellate court and that too, on materials then produced, I am of the view that no prejudice

would be caused to petitioners at all. If the petitioners are still of the view that their enjoyment of properties which have come to their share is adversely affected or that they have material with them which would demonstrate grave and serious prejudice, then it is open to them to apply to trial court afresh by placing all relevant material on record to establish that the pillar is common so also the water channel. The order under challenge or the observations therein would not preclude the petitioners from so applying in future. Needless to state that if such an application is preferred the trial court to consider the same on merits and in accordance with law.

8. In the meanwhile, trial court, considering the advanced age of respondent and some of the petitioners shall endeavour and dispose of the suit itself expeditiously. Petition disposed of accordingly.

(S.C.Dharmadhikari, J)